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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5221

OSCAR MITCHELL,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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Interest of *Amicus*

The American Civil Liberties Union is a private, non-partisan organization with 170,000 members from coast-to-coast. The Union historically has been committed primarily to the defense of those provisions of the Constitution which guarantee political and civil rights. In this case, those rights intersect, because it involves statements protected by the First Amendment being used to challenge racial discrimination in employment.

We think this is an especially important case because we believe that the defendant's conviction under the Hobbs

Act represents a misuse of that statute and is a dangerous precedent for treating bona fide anti-discrimination activity as criminal.

This brief is filed with consent of the parties.

Statement of the Case

The petitioner was indicted under 18 U.S.C. §1951 (the Hobbs Act) for attempting "to obstruct, delay, and affect commerce . . . by extortion" and for threatening "physical violence to persons and property in furtherance of such plan of extortion" by attempting to obtain the property of Mr. T's Rental, Inc., to wit:

> "(a) money in the form of wages to be paid for the unwanted and unnecessary services of a new manager for Mr. T's Rental at St. Louis, Inc., and
>
> (b) money in the amount of $1,000 to be paid to the Educational Fund of the Congress of Racial Equality (CORE)."

The indictment arose out of events which surrounded the discharge of one Whittington, a black person, from the post of assistant manager of the St. Louis store of Mr. T's Rental, Inc. Whittington contacted the petitioner, a job developer for CORE, for job placement assistance. The petitioner contacted the store manager, complained about the store's exploitation of the black community, and told him he wanted Whittington reinstated as manager. The manager testified, as the government's witness, that the petitioner told him, "If we don't get a black manager, we'll run you out of business," and when asked if he meant he would use violence, replied, "No, we are CORE and we be-

lieve in non-violence, but we will use every means possible to try to get you out of business by spreading leaflets, going on radio, by picketing your office." Sometime thereafter, Petitioner repeated his demands for a black manager and again said, "We'll boycott you, we'll put ads on TV, things along those lines."

There is testimony that, subsequently, after a meeting which included other employees of the store, petitioner stated to one of the employees that he didn't want "any black brothers sneaking in trying to deliver any TV's." An argument developed and the employee said he had to deliver television sets, to which the petitioner replied, "Then if you do, bring your shit [gun]. On cross-examination, however, the employee testified that the petitioner never told him not to take the trucks out. Nevertheless, according to the government witnesses, when the employees returned to the store that day they were afraid to deliver television sets that day and a corporate officer ordered them not to take them out.

A letter introduced into evidence by the government, sent by the petitioner to the president of Mr. T's Rental Service, complained about the company's excessive prices, again demanded employment of a black manager, and concluded by saying "you'll leave us no other choice but to boycott your office . . . and carry the whole issue before the 'Black-Public.' This will be followed-up by legal action, such as subpoening your books, and making your whole operation a matter for the St. Louis area Poor-People to see for themselves! The choice is yours. We have already waited too long for equality,—we will not wait any longer."

The government's evidence on the question of the demand for $1,000 has petitioner saying to an officer of Mr. T's

Rental, "We got to have a black manager in here today . . . [and] we also want a thousand dollars for our educational fund." The officer replied: "Well, I don't know about that. We felt we put money in the black community in other ways, and we didn't want to contribute to any educational fund," to which petitioner responded, "Well, you have got to contribute a thousand dollars to our education fund" (T. 144). Petitioner made no threat during this conversation.

REASONS FOR GRANTING THE WRIT

This is the first time that the federal government has prosecuted an official of a civil rights organization under the Hobbs Act (or any other statute as far as counsel know) on the theory that that Act is violated by demands put to a business company to improve its racially discriminatory hiring practices, or to secure a contribution to a legitimate non-profit social agency.

1. The government's evidence in this case focused on several incidents to establish the extortion element of the offense. It included statements about bringing a gun to work and shipping Mr. Whittington to Kansas in a box. But, significantly, it also included the petitioner's statements that Mr. T's Rentals refusal to hire a black manager would result in CORE's "spreading leaflets, going on radio, by picketing your office"; "we'll boycott you, we'll put ads on TV, things along those lines"; and to "carry the whole issue before the Black-Public." According to the government's theory, those statements, no less than the "gun" and "box" statements, were designed to provoke the "fear" that would induce Mr. T's Rental to give over its property, namely, the wages of its store manager. Permitting the case to go to the jury on this

theory was a direct violation of the petitioner's rights guaranteed by the First Amendment.

The right to circulate the kind of information about Mr. T's employment practices is precisely the kind of activity protected by the First Amendment because what it amounts to, especially because it would have been accomplished by an association like CORE, is:

> "Effective advocacy of both public and private points of view, particularly controversial ones, [which] is undeniably protected by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." *NAACP* v. *Alabama,* 357 U.S. 449, 460 (1958).

To convert the petitioner's statements that CORE would engage in constitutionally protected activity to protest employment discrimination, into the elements of a criminal offense, is impermissible. Even if the statements induced fear, that cannot support the conviction. The use of speech is not confined to stirring people to anger, see *Terminiello* v. *Chicago,* 337 U.S. 1 (1949); it can equally provoke fear without violating constitutional limits, for the fear so induced need not be of physical harm. It can be fear for one's reputation, fear for one's political position, or fear for the continuity of one's income. But under the theory of *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), *Garrison* v. *Louisiana,* 379 U.S. 64 (1964), *Rosenblatt* v. *Baer,* 383 U.S. 75 (1966), and *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967), any public official or public figure, or any person involved in a public issue, must be prepared to undergo free and open criticism in the public forum. Such criticism may indeed put the target of crit-

icism in some kind of fear, but the interest in free speech being paramount, he must undergo that criticism, even if it induces fear his business will consequently suffer. For as the Court said in *New York Times,* debate on public issues should be "uninhibited, robust and wide open." 376 U.S. at 270. That well settled view of the First Amendment requires, therefore, that defendant's conviction be reversed.

2. Even if we assume that petitioner did make some specific unlawful threats, on the record in this case it is impossible to separate those acts from his lawfully protected activities. Consequently, it is impossible to determine whether the jury convicted him of unlawful or of lawful activity. Under the circumstances, the conviction must be reversed. That result is required by *Street* v. *New York,* 394 U.S. 576 (1969) because it is clear that the jury might have thought the threats to engage in protected activity could be the basis for conviction. The refusal of the district judge to give the instructions requested by the petitioner relating to the protected nature of his statements, means not only that the jury might have based the conviction on those statements, but that the district judge intended the jurors to do so.

3. The petitioner's request for a thousand dollar contribution to CORE is also insufficient on this record because the request itself is protected by the First Amendment. Private agencies habitually seek funds with which to support their activities. Of course if CORE—or the Boy Scouts, the YMCA, the American Civil Liberties Union, or the United Jewish Appeal, to take a few examples at random—accompanied their solicitations for funds with threats of physical harm, the First Amendment would not protect them from criminal charges. But the fact is that

fund-raising techniques are various. Sometimes they are soft-sell, sometimes hard-sell—but in any case, there is surely insufficient evidence on this record to support the conclusion that the petitioner's request for a contribution to CORE was extortionate.* The right to associate, guaranteed by the First Amendment, must necessarily include the right to raise funds. To sustain the conviction here would be a direct threat to that right.

4. *Watts* v. *United States,* 394 U.S. 705 (1969), is very persuasive in this case. *Watts* involved a conviction under 18 U.S.C. §871 for threatening the life of the President. The alleged threat was made in the course of a public speech in the course of a discussion of the draft and the Vietnam War. The defendant there said he would not serve in the Army. He continued: "I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."

Reversing the conviction, the Court said, "We do not believe that the kind of hyperbole indulged in by petitioner fits within that statutory term [of threat]," 394 at 708, relying upon *New York Times* v. *Sullivan, supra.* And the Court added, significantly in the context of this case: "The language of the political arena, like the language used in labor disputes . . . is often vituperative, abusive and

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* In a book published in 1955 by the Russell Sage Foundation, entitled Attitudes Towards Giving, by F. Emerson Andrews, the author says that many private agencies put pressure on reluctant givers that is "little short of blackmail" (p. 115). He also points out that some of the private health agencies use "fear motivation" to secure funds (pp. 116-117). If the Red Cross or the American Cancer Society uses such a technique to raise money from Mr. T's Rental, should they expect to be prosecuted under the Hobbs Act? To ask the question is to answer it, and it should also answer the question whether petitioner's fund-raising was criminal. The incident is so trifling, as is the "evidence," the conviction must be reversed on this ground as a matter of law.

inexact." The Court might easily have added the words "racial disputes," to fit this case exactly. Surely, the Court's recognition of the kind of language common in such disputes, often full of hyperbole, requires this Court to apply the full protection of the First Amendment to petitioner's statements. It surely applies to the threats of public action; it can as well be applied to the statements relating to the gun and the box. See *Linn* v. *United Plant Guard Workers Local 114*, 383 U.S. 53 (1966).

The effect of the prosecution and conviction in this case is bound to inhibit legitimate statements designed to improve conditions of employment of minority group members. It is vital, therefore, for the Court to hold that this kind of speech is not a crime under the Hobbs Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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